

*Maureen
PLM 2*

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-221466

DATE: July 3, 1986

MATTER OF: Maureen S. Fearn

DIGEST:

The widow of a deceased Coast Guard member erroneously received retired pay amounting to \$43,281.68 which should have ceased upon the member's death. When the erroneous payments were discovered it appeared the widow was not entitled to a survivor annuity and waiver of the erroneous payment was granted. The service then determined that although the member had elected not to participate in the Survivor Benefit Plan, the service had failed to inform the spouse of that fact and this entitled the widow to receive a full annuity under the Plan. Although the annuity entitlement is retroactive to the date of the member's death, the widow is not entitled to additional payment for the period for which she received the erroneous retired pay which was waived. Since the waiver action was based on incomplete facts, it is modified to apply only to the excess she received over the amount due for the annuity for that period, and the balance is considered as satisfying her annuity entitlement.

This action is in response to a request for an advance decision from the United States Coast Guard regarding whether payment of the full amount of a Survivor Benefit Plan annuity should be made to Maureen S. Fearn, for the same period she received her husband's retired pay which, due to administrative error, continued to be paid into her

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bank account after the death of her husband, a retired member of the Coast Guard.^{1/} Collection of the erroneous retired pay was waived by our Claims Group prior to the determination that Mrs. Fearn was eligible to receive Survivor Benefit Plan annuity payments for the same period. It is our view that no additional amount should be paid to Mrs. Fearn for this period.

Background

Captain William R. Fearn, United States Coast Guard, retired in 1979 and was receiving retired pay when he died on June 4, 1981. The Retired Pay Branch of the Coast Guard was notified of his death on June 8, 1981, and again on October 21, 1981, when Mrs. Fearn submitted a "Claim for Unpaid Compensation of Deceased Member of the Uniformed Service." Prior to his death the monthly checks for his retired pay were being sent to the Connecticut Bank and Trust Company where they were deposited in his and Mrs. Fearn's joint account. Due to an administrative error no action was taken to remove Captain Fearn from the retired rolls and despite the fact that at the Bank's suggestion Mrs. Fearn removed Captain Fearn's name from the account, the checks continued to be sent to the bank and deposited in the account.

The Coast Guard discovered the erroneous payments in September 1982 at which time the payments were stopped. During the period from June 1981 through September 1982, Mrs. Fearn thus received payments totalling \$43,281.68. She requested waiver of the total amount of erroneous payments stating that she had been told by her husband that she would be receiving survivor benefits and that she believed in good faith that the amounts she was receiving constituted those benefits. At the time the service notified her of the overpayment, it informed her that Captain Fearn had not elected participation in the Survivor Benefit Plan, so she was not eligible for an annuity. The Coast Guard forwarded Mrs. Fearn's request for waiver to this Office with the

^{1/} The request was made by Donald H. Senker, Authorized Certifying Officer, United States Coast Guard, Pay and Personnel Center, Topeka, Kansas, and has been assigned Department of Defense, Military Pay and Allowance Committee control number ACO-CG-Control # 1458.

recommendation that waiver be granted. By action of November 21, 1984, our Claims Group waived collection of the overpayment.

Subsequent to the waiver action, the Coast Guard found that at the time he retired Captain Fearn elected not to participate in the Survivor Benefit Plan, and he did not inform his wife of his election. The Coast Guard also found that it had no record of notifying Mrs. Fearn of Captain Fearn's election not to participate, which was contrary to the provisions of 10 U.S.C. § 1448(a)(3) which require the service to notify a member's spouse if the member does not elect coverage for the spouse. Thus, after informing Mrs. Fearn that she had been erroneously receiving retired pay and that she was not entitled to a Survivor Benefit Plan annuity, the Coast Guard determined that Captain Fearn's election not to participate was not valid, and that Mrs. Fearn was entitled to receive a full annuity under the Survivor Benefit Plan equal to 55 percent of Captain Fearn's retired pay.^{2/}

The Coast Guard therefore determined that Mrs. Fearn was entitled to an annuity beginning from the date of Captain Fearn's death and, in August 1985, began current payments. It also determined that her net retroactive annuity entitlement for the period from Captain Fearn's death in June 1981 through July 1985 totaled \$79,425.05, which included the period during which she had received the \$43,281.68 in erroneous retired pay.

The issue in this case, then, is whether Mrs. Fearn may retain the erroneous retired pay in addition to the Survivor Benefit Plan annuity for the same time period thus allowing her an amount equal to 155 percent of the member's retired pay for that time period, or whether the amount received in retired pay should be set off from the amount Mrs. Fearn will receive under the Survivor Benefit Plan.

^{2/} This determination apparently was based on court decisions interpreting the provisions of 10 U.S.C. § 1448(a)(3) in this manner. See Barber By and Through Barber v. United States, 676 F.2d 651 (Ct. Cl. 1982), and Passaro v. United States, 4 Cl. Ct. 395 and 5 Cl. Ct. 754 (1984).

Analysis

The statute authorizing our Office to waive claims arising out of "erroneous payments" of retired pay provides discretionary authority to grant such relief in whole or in part under certain conditions, including when collection of the debt would be "against equity and good conscience and not in the best interest of the United States."^{3/}

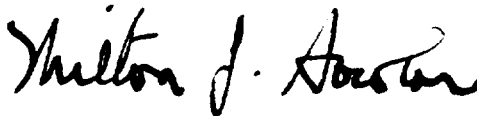
Usually, in a case where a spouse receives overpayments due to the service's failure to stop payment of retired pay, the spouse is also entitled to retroactive payment of an annuity in a lesser amount for the same period. In such a case ordinarily the waiver would be granted only for the net amount of the debt. See generally 55 Comp. Gen. 113, 117 (1975).

As is indicated above, at the time the waiver action was taken it appeared that Mrs. Fearn was not entitled to a Survivor Benefit Plan Annuity and, instead, that she had received erroneous payments from the Coast Guard totaling \$43,281.68. We now know, however, that as a matter of fact she was due a survivor annuity in a lesser amount for the same period for which she received the \$43,281.68. Thus, the net debt she owed the Coast Guard at the time the retired pay was stopped at the end of August 1982, was \$43,281.68 less the annuity she was due from the Coast Guard for the same period. It was the net amount to which the waiver action should have applied in this case. In keeping with the language and spirit of the waiver statute, which provides discretion to waive in whole or in part debts arising from erroneous payments the collection of which would be against equity and good conscience and not in the best interest of the United States, we therefore modify the waiver action to conform to the facts and to render done that which should have been done.

Accordingly, for the period June 5, 1981, through August 31, 1982, Mrs. Fearn is considered to have received the full amount of her entitlement under the Survivor Benefit Plan and is not required to refund the excess she received. That is, she may retain the \$43,281.68 she received for that period although further payments for that

^{3/} 10 U.S.C. § 2774(a). See also 10 U.S.C. § 1453 concerning waiver of recovery of erroneous Survivor Benefit Plan annuities.

period should not be made to her. She is also due full annuity payments for the period beginning September 1, 1982, through July 1985, after which her current annuity payments were begun.

for 
Comptroller General
of the United States